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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LISIATE UEINI TAVAKE, Defendant and Appellant.	G042591 (Super. Ct. No. 08NF0102) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Francisco P. Briseno, Judge. Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Angela Borzachillo and Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

Following a bench trial at which appellant represented himself, the trial court found appellant guilty of robbery, receiving stolen property and street terrorism. It also found he acted for the benefit of a criminal street gang and was personally armed with a deadly weapon. The court acquitted him of two other robbery charges and sentenced him to six years in prison. Appellant contends the court erred by forcing him to choose between his statutory right to a speedy trial and his Sixth Amendment right to effective assistance of counsel. However, we find no violation of appellant's rights and affirm the judgment in its entirety.

FACTS[1]

On January 10, 2008, two men robbed the Cali DVD Video Store in Anaheim. One of the men had a machete and was wearing a stocking mask over his face. Shortly after the robbery, the police apprehended appellant and Willie Wong in the area. They also found a machete and Cali merchandise inside the nearby apartment of Wong's girlfriend. During a curbside show-up, the video store clerk tentatively identified appellant as the masked robber. Appellant and Wong were both members of the Royal Samoan Posse, a criminal street gang, at the time of the robbery.

Appellant was originally represented by the Alternate Public Defender's Office, but that office had a conflict, as did several other attorneys who represented appellant in the early stages of the case. Therefore, on January 5, 2009, the court appointed Attorney William G. Morrissey to represent appellant. Despite Morrissey's efforts at the April 17 preliminary hearing, appellant was bound over for trial. He was arraigned on April 29, and his trial was set for June 17, 2009.

On that day, however, Morrissey sought a continuance on the grounds he needed additional time to investigate the case and prepare for trial. He also

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1 We will limit our statement of facts to the crimes of which appellant was convicted.

informed the court appellant was not willing to waive his statutory right to be tried within 60 days of his arraignment. (See Pen. Code, § 1382.) Thereupon, the court informed appellant he had two choices: He could maintain his right to a speedy trial and go to trial forthwith, in which case he would have to represent himself, or he could agree to a continuance to allow Morrissey to prepare for trial.

Appellant made it clear he did not like either option. He told the court he wanted to be tried right away *and* he wanted to be represented by a competent attorney. However, given that Morrissey needed more time to get ready for the trial, the court told him it was not possible for both of these things to occur. It reiterated to appellant that the only way he could go to trial right away was if he was willing to represent himself. Again, appellant protested, saying the court was forcing him to choose between a speedy trial and adequate representation. When he insisted that he didn't want to waive time or represent himself, the court continued the trial until July 15, 2009. In so doing, the court reasoned that appellant effectively waived his right to a speedy trial by refusing to go to trial as his own attorney.

On July 9, the court granted Morrissey's request for the appointment of a special defense investigator. According to Morrissey, the investigator was needed to interview numerous witnesses and review various discovery materials related to the case. Not surprisingly, that work was not finished by July 15, when the trial was scheduled to begin. On that day, Morrissey therefore asked the court to continue the trial date again. The court was sympathetic to the request, even though it led to a replay of its previous discussion with appellant. As before, the court told appellant that, given the fact Morrissey needed more time to prepare, he could either agree to a continuance for that purpose, or he could proceed to trial immediately as his own attorney. And as he did before, appellant bristled at his choices. However, he ultimately decided he wanted to proceed to trial without further delay.

In coming to this decision, appellant made it clear he was not happy with the prospect of having to defend himself. In fact, he complained he was being forced to proceed in pro per because of Morrissey's lack of diligence in preparing his case. Fearing Morrissey would try to obtain further continuances down the road, appellant told the court he had no other choice but to go to trial as his own attorney. The court did not see it that way. To the contrary, it perceived appellant as making a free and voluntary decision to waive his right to appointed counsel. Appellant acknowledged he would rather proceed as his own attorney than have his trial continued again. He also signed a waiver expressly relinquishing his right to appointed counsel. Thereupon, the case proceeded to trial with appellant acting as his own attorney.

During the trial, the video store clerk identified appellant as the masked robber, and the trial court convicted him in connection with the video store robbery. However, it acquitted appellant of two robbery charges stemming from an unrelated incident.

DISCUSSION

Appellant claims he did not voluntarily waive his right to appointed counsel because the court placed him in the intolerable position of having to choose between that right and his right to a speedy trial. We disagree.

Under the Sixth Amendment, a criminal defendant has the right to be represented by competent counsel. Conversely, the Sixth Amendment also affords the criminally accused the right to act as their own attorney: "'The Constitution does not force a lawyer upon a defendant.' [Citation.]" (*Faretta v. California* (1975) 422 U.S. 806, 814-815.) However, any waiver of the right to appointed counsel must result from the voluntary exercise of free will. (*Id*. at p. 835.)

That does not mean the defendant's decision to waive must be free of adverse consequences. Indeed, the law recognizes that criminal defendants are often

required to choose between competing interests. "Although a defendant may have a right, even of constitutional dimension, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." (*McGautha v. California* (1971) 402 U.S. 183, 213.) Therefore, a defendant's decision to forego appointed counsel will not be deemed involuntary simply because it was made to safeguard some other right or interest, such as the right to a speedy trial. (*People v. Bolton* (2008) 166 Cal.App.4th 343 (*Bolton*).)

In *Bolton*, the court observed, "The tension between a defendant's right to a speedy trial and the right to effective assistance of counsel frequently arises when a defendant's desire to invoke his right to a speedy trial conflicts with his attorney's request for a continuance. [Citation.] Courts that have dealt with this conflict have reached different results, depending on the circumstances of the particular case. [Citation.] 'Implicit in these decisions . . . is the notion that the inherent tension between the right to a speedy trial and the right to competent, adequately prepared counsel is not, in itself, an impermissible infringement on the rights of the accused, including the right to a fair trial.' [Citation.]" (*Bolton, supra,* 166 Cal.App.4th at p. 356.)

In *Bolton*, however, the "inherent tension" between the defendant's right to a speedy trial and his right to effective assistance of counsel was exacerbated by trial court error. Based on appointed counsel's representation that he had a conflict of interest with the defendant, the court relieved counsel on the eve of trial. Then, rather than agreeing to continue the trial past the statutorily prescribed speedy trial deadline in order to allow another attorney to get up to speed on the case, the defendant opted to represent himself. (*Bolton, supra*, 166 Cal.App.4th at pp. 352-355.) After he was convicted, the defendant appealed on the basis he did not voluntarily waive his right to appointed counsel, and the appellate court agreed.

As a threshold matter, the court determined the trial court erred in relieving appointed counsel based on the alleged conflict of interest. (*Bolton*, *supra*, 166 Cal.App.4th at pp. 356-359.) The court was forced by that finding to support its ultimate conclusion on the waiver issue. It reasoned, "The trial court permitted [counsel] to withdraw, despite the fact that his withdrawal was 'not necessary under the circumstances,' and unfairly placed defendant in the position of having to choose between his right to the assistance of counsel and his right to a speedy trial." (*Id*. at p. 358.) In fact, "*it was only because of the court's error* in relieving [counsel] just four days before trial had to begin that [defendant] ultimately waived his right to counsel." (*Id*. at p. 359, italics added.) The *Bolton* court concluded that, under those circumstances, the defendant's waiver of the right to appointed counsel was not made in a knowing and voluntary fashion. (*Id*. at p. 361.)

Appellant claims his case is indistinguishable from *Bolton*. He also cites *Pazden v. Maurer* (2005) 424 F.3d 303 (*Pazden*) and *Sanchez v. Mondragon* (1988) 858 F.2d 1462 (*Sanchez*) in support of his position that his decision to waive his right to appointed counsel was involuntary. As in *Bolton*, the purported waivers of the right to counsel in those two cases were precipitated by trial court actions that contributed to the defendants' dilemma. In *Pazden*, it was the trial court's refusal to grant the defense a continuance. (*Pazden, supra*, 424 F.3d at p. 316.) And in *Sanchez*, it was the trial court's failure to make adequate inquiry into defense counsel's preparedness. (*Sanchez, supra*, 858 F.2d at p. 1466.) In both cases, the trial court's actions forced the defendant into the untenable position of having to choose between incompetent or unprepared counsel and appearing in pro per. (*Pazden, supra*, 424 F.3d at pp. 316-319; *Sanchez*, *supra*, 858 F.2d at pp. 1465-1467.)

Here, in contrast, the trial court did not force appellant into making such an undesirable decision. Instead, it gave appellant the option of continuing his trial until his appointed counsel was fully prepared to represent him. Granted, that option

necessitated appellant waiving his statutory right to a speedy trial. But, unlike the circumstances in *Bolton*, the court did not do anything to contribute to appellant's dilemma in that regard. Nor did the prosecution. Rather, appellant's right to a speedy trial was jeopardized solely because his own attorney needed more time to investigate the charges and prepare for trial. This is precisely "the type of contingency that may occur even in a reasonably funded and efficiently administered trial court system that handles a large volume of criminal cases. The state cannot fairly or reasonably be held responsible for all such contingencies that may occur." (*People v. Sutton* (2010) 48 Cal.4th 533, 554; see also *People v. Johnson* (1980) 26 Cal.3d 557, 570 [delays for the defendant's benefit or delays arising from unforeseen circumstances constitute good cause for continuing a case past the statutorily prescribed speedy trial deadlines].)

Appellant contends that rather than allowing him to represent himself, the trial court should have continued the case over his objection or forced Morrissey to proceed with the trial despite his lack of preparedness. He claims it is not clear why the court did not pursue these alternatives to self-representation, but the record shows appellant made an informed decision to represent himself, based on the circumstances presented. Indeed, the court repeatedly explained to appellant that because Morrissey needed more time to prepare, he could either waive time for trial or go ahead and represent himself. Knowing these alternatives, appellant made an affirmative decision — both orally and in writing — to proceed in pro per. Although he complained about having to make this decision, his dilemma was not brought about by anything the state did or did not do. Therefore, there is no cause for reversal. Because the record demonstrates appellant made a knowing and voluntary decision to waive his right to appointed counsel, there is no basis to disturb the judgment.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.